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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GRASSI & DOMINIC SANTARELLI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the potential availability of a declarant as a defense witness invariably obviates the need for any showing of either reliability or unavailability in Confrontation Clause cases.

2. Whether hearsay statements admissible under the federal rules of evidence are automatically deemed reliable for Confrontation Clause purposes.

3. Whether hearsay statements concerning the bad reputation of a Hobbs Act defendant, made without the defendant's knowledge, are admissible at trial absent a special showing of need.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
I. Introduction of Hearsay Testimony to Establish the Subjective Fear of the Alleged Victims Denied Petitioners Their Rights Under the Confrontation Clause of the Sixth Amendment	7
A. The Relevance of the Declarant's Availability as a Defense Witness	9
B. The Significance of Admissibility Under An Exception to the Hearsay Rule	14
II. The Court Admitted the Evidence Linking Petitioners with Organized Crime Without Undertaking the Full Weighing of Probative Value and Prejudicial Effect Mandated by the Federal Rules of Evidence	19
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Boone v. Marshall, 760 F.2d 117 (6th Cir. 1985) 15
California v. Green, 399 U.S. 149 (1970) 7, 10
Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964) 24
Douglas v. Alabama, 380 U.S. 415 (1965) 7
Dutton v. Evans, 400 U.S. 74 (1970) 7
Hoover v. Beto, 439 F.2d 913 (5th Cir. 1971), *rev'd on other grounds*, 467 F.2d 516 (*en banc*), *cert. denied*, 409 U.S. 1086 (1972) 11
Lee v. Illinois, 106 S. Ct. 2056 (1986) 7, 10, 15, 16
Mancusi v. Stubbs, 408 U.S. 204 (1972) 9
Mattes v. Gagnon, 700 F.2d 1096 (7th Cir. 1983) .. 16
New York Life Insurance Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1945) 14
Ohio v. Roberts, 448 U.S. 56 (1980) ..... *passim*
Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973) 15
Park v. Huff, 493 F.2d 923 (5th Cir. 1974), *rev'd on other grounds*, 506 F.2d 849 (*en banc*), *cert. denied*, 423 U.S. 824 (1975) 11
Sanson v. United States, 467 U.S. 1264 (1984) 16
Simmons v. United States, 440 F.2d 890 (7th Cir. 1971) 11
Tennessee v. Street, 105 S. Ct. 2078 (1985) 7, 8, 23
United States v. Addock, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977) 20
United States v. Ammar, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983) 16
United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) 24
United States v. Billingsley, 474 F.2d 63 (6th Cir.), *cert. denied*, 414 U.S. 819 (1973) 20
United States v. Bruscino, 662 F.2d 450 (7th Cir. 1981), *cert. denied*, 459 U.S. 1211, 1228 (1983) .. 22
United States v. Caputo, 758 F.2d 944 (3d Cir. 1985), *vacated*, 791 F.2d 37 (1986) 17
United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 859 (1986) 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Cree, 778 F.2d 474 (8th Cir. 1985) 10
United States v. Curcio, 759 F.2d 237 (2d Cir.), *cert. denied*, 106 S. Ct. 142 (1985) 20
United States ex rel. Thomas v. Cuyler, 548 F.2d 460 (3d Cir. 1977) 11
United States v. DeLuna, 763 F.2d 897 (8th Cir.), *cert. denied*, 106 S. Ct. 382 (1985) 16
United States v. Duhon, 565 F.2d 345 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978) 20
United States v. Haimowitz, 725 F.2d 1561 (11th Cir.), *cert. denied*, 105 S. Ct. 563 (1984) 20
United States v. Holmes, 767 F.2d 820 (11th Cir. 1985) 22
United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) 5, 6, 20
United States v. Inadi, 106 S. Ct. 1121 (1986) .....*passim*
United States v. James, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979) 24
United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2919 (1986) 16
United States v. Love, 534 F.2d 87 (6th Cir. 1976) .. 22
United States v. Molt, 758 F.2d 1198 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986) 16
United States v. Oates, 560 F.2d 45 (2d Cir. 1977) .. 11
United States v. Ordonez, 722 F.2d 530 (9th Cir. 1983) 16
United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *modified on other grounds*, 686 F.2d 356 (1982), *cert. denied*, 464 U.S. 965 (1983) 15
United States v. Perez, 702 F.2d 33 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983) 16
United States v. Perry, 512 F.2d 805 (6th Cir. 1975) 22
United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) 24
United States v. Vinsen, 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074, 445 U.S. 905 (1980) 24

TABLE OF AUTHORITIES—Continued

	Page
United States v. Williams, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985)	16
United States v. Wolfe, 766 F.2d 1525 (11th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 1379 (1986)	14
United States v. Young, 736 F.2d 565 (10th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 1038 (1985)	16
Williams v. Melton, 733 F.2d 1492 (11th Cir.), *cert. denied*, 105 S. Ct. 567 (1984)	15
STATUTES:	
18 U.S.C. § 1951	2
18 U.S.C. § 1951(b)(2)	20
18 U.S.C. § 3500	13
28 U.S.C. § 1254(1)	2
Fed. R. Evid. 403	6, 20, 21, 23
Fed. R. Evid 404	21
Fed. R. Evid. 801(d)(2)(E)	16
Fed. R. Evid. 803(3)	8, 14, 17
OTHER AUTHORITIES:	
J. Weinstein & M. Berger, *Weinstein's Evidence* (1985)	22
Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978)	14

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Dante Grassi and Dominic Santarelli petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 783 F.2d 1572 and reprinted as Appendix A to this petition. The district court issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1986. An order denying defendants' petition for rehearing en banc was entered on June 4, 1986 and is reprinted as Appendix B. An order extending time to

file petition for writ of certiorari to September 2, 1986 was signed by Justice Powell on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT

Petitioners Grassi and Santarelli were convicted of violating the Hobbs Act, 18 U.S.C. § 1951, by extorting money from Robert Wilson, Richard Williams, and the Federal Bank and Trust Company, Ltd. Their convictions were affirmed by the Court of Appeals for the Eleventh Circuit.

In mid-1978, Wilson and Williams organized a tax shelter program for United States citizens which involved the use of off-shore Bahamian corporations and banks. Although the program purported to create tax shelters through the purchase and sale of T-bills and Ginny Mae mortgage instruments by a trader named Charles Tritt, in fact, Wilson, Williams, and Tritt had no intention of actually engaging in trading. Instead, they used an entity in the Bahamas called the Federal Bank and Trust Company to generate paper transactions to confer an appearance of legitimacy on the operation.[1]

Initially, the scheme faltered for lack of funds and the absence of corporate entities necessary for its operation. Wilson then turned for help to petitioner Santarelli, a neighbor of Wilson's who had loaned Wilson money on prior occasions. Santarelli loaned Wilson an undisclosed amount of money and introduced him and Williams to several people in the Bahamas who helped them to incorporate entities to become involved in the tax shelter operation. One such Bahamian was Clement Pinder.

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[1] The tax shelter scheme itself was the subject of an independent criminal proceeding. Pet. App. 2a. At the time of the trial in this case, Williams had reached a plea agreement with the Government concerning his involvement in the tax shelter program, Tr. vol. 4, at 33-34, and Wilson was awaiting trial concerning his involvement, Tr. vol. 7, at 136.

Through Pinder, Wilson and Williams arranged for a Bahamian accounting firm to "audit" bogus confirmation slips, and the three also arranged for an off-shore trust company to serve as a conduit for the fees for the sale of fictitious tax losses. Pet. App. 2a.

Charles Tritt testified that in February 1979, petitioner Santarelli had a conversation with Tritt in the Bahamas in which Santarelli stated that he had loaned the money to Wilson without interest, and that Santarelli had told Wilson that when the business was good and healthy and able to pay its bills they should not forget Santarelli. According to Tritt's testimony, Santarelli also told Tritt, "Well, I guess they'll come around with a present one of these days." Tr. vol. 3, at 58-59.

Tritt also testified that in a subsequent conversation with Tritt in the Bahamas, Santarelli learned that the tax shelter scheme was in fact generating a large amount of cash. Tr. vol. 3, at 64. According to Tritt, Santarelli also learned that Wilson and Williams had approached Pinder about establishing a lottery in the Bahamas. Tritt testified that Santarelli became upset that Wilson and Williams had contacted Pinder about a separate venture without first consulting him. Pet. App. 2a.

Richard Williams testified that, shortly thereafter, petitioner Grassi, who also lived near Wilson, telephoned Wilson and told him to come to his apartment and to bring Williams. According to Williams' testimony, Grassi told Wilson and Williams that Santarelli was upset about their attempt to establish a lottery program through Santarelli's Bahamian contacts without telling him. Williams further testified that he told Grassi the money borrowed from Santarelli by Wilson had been repaid with interest, and that he felt no need to consult him. According to Williams, Grassi then slapped Williams twice and stated, "You got to show respect." Wilson stepped between the two men, stating that Williams should leave

matters to him and that they would meet with Santarelli in the Bahamas two days later. Pet. App. 3a.

Williams further testified that he and Wilson flew to the Bahamas two days later to meet with Santarelli.[2] Williams testified that Santarelli explained that Wilson and Williams should have consulted him before they approached his friend Pinder about the lottery venture. According to Williams, Santarelli stated that they "had made him look like a fool with his people in the Bahamas, and that he was going to take a piece of the Bank." At that point, Williams asked if Santarelli was taking five percent of the tax shelter scheme. Santarelli jabbed his finger into Williams' chest and said, "No. I'm taking one-third." Williams then began to argue, at which point Wilson again intervened and took him into the next room.

Wililams testified that, out of the presence of Santarelli and Grassi, the following conversation took place between himself and Wilson:

> Q. State what was said sir.
>
> A. Well, Bob took me into the other room and said, "Look, let me handle this."
>
> I said, "Bob, what are you talking about? You're talking about somebody taking a whole one-third of the bank," and I said, "We're going [sic] all the work."
>
> I said, "You know, it just doesn't seem fair to me."
>
> He said, "Look you know, they were there when we wanted them. I got my money when I needed it. They helped us with the people that needed to be got at in Nassau, set up the trust company and everything else."
>
> He said, "Let me handle it. Let me work it out."
>
> I said, "Well, I think that a third is just too much."

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[2] Grassi was present during the meeting but did not participate in the discussions.

I said, "You know, okay, maybe for that we ought to give away, maybe, ten percent, I don't know, but a third sounds like one hell of a lot to me."

So, he said, "Well, look, I don't know about you, but I got kids and I don't intend to argue."

So, he said, "I"—he said, "You don't argue with people like this. If they say they want a third, they're going to take a third and what the hell are you going to do about it."

So, I didn't do anything about it.

Q. What did you say?

A. I said, "Well, if you really think that's true, then I guess I've got to go along with what you say." Pet. App. 4a, 5a.

Wililams testified that he and Wilson returned to the room and told Santarelli that they agreed to his having a one-third share of the bank. Williams further testified that in early 1980, he caused approximately 1.4 million dollars to be transferred into a Bahamian corporation owned and controlled by Santarelli as payment of his share of the program's 1979 profits. Pet. App. 5a.

At trial, counsel for defendants objected strenuously to the admission of out-of-court statements by Wilson and others describing defendant as "underworld" and "Mafia" and as people "you don't argue with." Pet. App. 11a. The trial court, relying on *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), overruled these objections on the ground that the testimony was admissible to show the victims' fearful state of mind. Pet. App. 12a, 19a-21a.

On appeal to the Eleventh Circuit, petitioners' urged, *inter alia*, that their Sixth Amendment confrontation rights were denied because of the Government's reliance on hearsay testimony to elicit evidence of the defendants' alleged organized crime connections as well as of alleged fear of the defendants by the victims. In addition, peti-

tioners urged that, regardless of the manner by which it was introduced, the district court erred in admitting evidence of petitioners' alleged ties to organized crime under Fed. R. Evid. 403. The court of appeals concluded, however, that petitioners' confrontation rights were not denied by the admission by way of Williams of Wilson's out-of-court statements concerning the defendants' reputation and Wilson's fear of them. Relying heavily on *United States v. Hyde, supra*, the court concluded that Wilson's statements concerning his fear of petitioners were admitted as evidence of his state of mind, and not for their truth, and thus were exceptions to the hearsay rule. "The defendants' right of cross examination," the court quoted from *Hyde*, "is preserved in that he can ask the witness whether he truly heard these fear-producing statements." Pet. App. 13a. The court also asserted that any problems inherent in the admission of *Wilson's* statements through *Williams'* testimony was cured by the fact that Wilson had been granted immunity to testify and could have been called by the defendants as a witness. Pet. App. 13a. Finally, the court rejected petitioners' contention that this evidence should have been excluded under F. R. Evid. 403 because its probative value was substantially outweighed by the danger of unfair prejudice. The court stated that Rule 403 "is an extraordinary remedy to be used sparingly" and concluded that the trial court did not abuse its discretion in refusing to exclude the Mafia reputation evidence. Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

The Government's presentation in this case of hearsay testimony linking the defendants to the "underworld" and the "Mafia" raises several questions warranting review. First is the question whether the introduction of this evidence through hearsay testimony conflicted with petitioners' Sixth Amendment right to confront their accusers. Although the Eleventh Circuit rejected petition-

ers' Confrontation Clause claim, its stated reasons were not only unconvincing but are irreconcilable with controlling precedents in other circuits. These conflicts—which persist in the wake of this Court's rulings last Term in *United States v. Inadi*, 106 S. Ct. 1121 (1986), and *Lee v. Illinois*, 106 S. Ct. 2056 (1986)—require resolution by this Court.

Second, wholly apart from the manner in which this testimony was introduced, the prosecution's use of prejudicial reputation evidence exemplifies a general pattern of unfairness in Hobbs Act prosecutions. In such cases, the lower courts routinely allow prosecutors to link defendants to organized crime without undertaking any kind of serious analysis of the probative value of this evidence in the context of a given case. Here again, the lower courts are plainly in need of further guidance from this Court.

I. Introduction of Hearsay Testimony to Establish the Subjective Fear of the Alleged Victims Denied Petitioners Their Rights Under the Confrontation Clause of the Sixth Amendment

The Confrontation Clause is implicated in this case because (1) the Government introduced the out-of-court statements of a declarant, Wilson, who was never called to the stand as a witness, and (2) those statements were introduced for a "hearsay" purpose—*i.e.*, to prove the truth of what was asserted.[3] In essence, the prosecution

[3] The " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' and 'stem from the same roots.' " *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *California v. Green*, 399 U.S. 149, 155 (1970), and *Dutton v. Evans*, 400 U.S. 74, 86 (1970)). At bottom, the goal is preserving the right to cross-examine adverse witnesses in those cases where a cross-examination can play a useful role in improving the accuracy of the trial process. *See Tennessee v. Street*, 105 S. Ct. 2078, 2082 (1985); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). Introduction of hearsay can undermine this goal when important facts are established through the statement of a declarant who is not subject to cross-examination.

sought to prove Wilson's fear of the defendants by asking another witness, Williams, to quote Wilson's contemporaneous descriptions of his own state of mind.[4] Wilson, in turn, was never called to defend or explain the basis or meaning of his statements.

In such a case, since the defendant is not given a chance to cross-examine one of his "accusers," the prosecution must make a sufficient showing to justify a relaxation of the usual right of confrontation.[5] In the typical case, this showing consists of proving two essential predicates. First, the hearsay statement must bear sufficient " 'indicia of reliability' " to satisfy the court that cross-examination is not essential. *Ohio v. Roberts*,

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[4] Both the district court, Pet. App. 12a, and the court of appeals, Pet. App. 13a, recognized that these statements were introduced, in part, to show the truth of what Wilson was saying about his own fear. Although Wilson was not quoted as saying "I'm afraid of Santarelli," his out-of-court statements were functionally equivalent to such an assertion. *See, e.g.*, Pet. App. 4a ("I don't know about you, but I got kids and I don't intend to argue.") The fact that Wilson's characterizations were, to this extent, less than explicit, does not alter their character as hearsay.

The court below, in ruling on this issue, appears to have been somewhat confused about the distinction between statements that are "non-hearsay" and statements that are hearsay but are nevertheless admissible under an exception in the hearsay rule. It did, however, indicate that the evidence here fell into the latter category by approving its admission under Fed. R. Evid. 803(3)—which allows admission of hearsay descriptions of a person's existing mental, emotional or physical condition. Any confusion on this score probably resulted from the fact Wilson's statements were simultaneously used for the non-hearsay purpose of showing the state of mind they produced in *Williams* when he heard them.

[5] We note that this case, involving hearsay evidence, is fundamentally different from the situation presented in *Tennessee v. Street, supra*, where the Court approved use of an out-of-court statement to show something other than the truth of the statement itself. In such a case, Sixth Amendment concerns are minimal, because cross-examination of the declarant would serve no purpose.

448 U.S. 56, 66 (1980) (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)). Second, with some types of hearsay, the Government must also be able to justify the need to resort to hearsay by demonstrating that the declarant is not available to appear as a witness. *Ibid.*; *cf. United States v. Inadi*, *supra* (holding that the unavailability requirement does not apply to statements admitted under the exception for co-conspirator declarations).

In the present case, however, the Eleventh Circuit eschewed this familiar analysis. Instead, it concluded that the petitioners' claims did not even raise an issue under the Confrontation Clause. First, the court held that the Sixth Amendment issues that would otherwise be generated by the prosecution's reliance on the hearsay statements of a non-appearing declarant are eliminated if the defendant could have called the declarant as his own witness. Because Wilson had been granted immunity and thus could have been called as a witness by the defense, the court ruled that the defendants' opportunity to "confront" their accuser as their own witness was equivalent to the appearance of the declarant as a prosecution witness subject to cross-examination. In addition, the court relied on the fact that the statements at issue here were admissible under an exception to the hearsay rule, thus suggesting that admissibility under the Federal Rules of Evidence is sufficient, on its own, to foreclose further constitutional challenges to hearsay evidence. Neither of these justifications is defensible on its own merits or consistent with the prevailing rules in other circuits.

A. *The Relevance of the Declarant's Availability as a Defense Witness*

Perhaps the most serious error made below is the court's ruling that mere availability of a declarant as a defense witness is equivalent to an opportunity to cross-examine that declarant during the prosecution's case at

the time the hearsay statement is introduced. Such a rule would, in effect, not only allow prosecutors to avoid producing declarants for cross-examination, but would also relieve them completely of the threshold showings of reliability and unavailability mandated in *Ohio v. Roberts*, *supra*, simply by pointing to a defendant's ability to subpoena the same witness himself. Left undisturbed, this ruling would significantly undermine the value of the Sixth Amendment as a protection against prosecutorial reliance on hearsay evidence.

It is true, of course, that Confrontation Clause issues cease to exist in any case where the prosecution presents hearsay evidence and then produces the declarant for cross-examination. *See California v. Green*, 399 U.S. 149 (1970) (approving introduction into evidence of prior inconsistent statement by government witness). In such a case, the declarant's appearance as a prosecution witness provides the defense ample opportunity to "confront" him and challenge the meaning and basis of his prior statement.

But it would be quite another thing to hold that all Sixth Amendment concerns involving hearsay evidence are allayed whenever the defendant could, much later in the course of the trial, call the declarant himself. And although such a rule finds some support in Justice Blackmun's dissenting opinion last term in *Lee v. Illinois*, *supra*, 106 S. Ct. at 2067 n. 3, and has been endorsed by one other circuit, *United States v. Cree*, 778 F.2d 474 (8th Cir. 1985),[6] it has been rejected by at least three others. These courts have correctly recognized that, in cases where a right of cross-examination is mandated by

[6] In *Cree*, the Eighth Circuit refused to reach the merits of a confrontation claim, holding that the defendant had waived any such claim by failing to call an available declarant as his own witness. The dissenting opinion disputed vigorously the notion that confrontation rights turn on the availability of the declarant as a defense witness. 778 F.2d at 483-87 (Oliver, J., sitting by designation).

the Confrontation Clause, the defendant's opportunity later to call the declarant as a defense witness is not a sufficient substitute. *See United States v. Oates*, 560 F.2d 45, 82 n. 39 (2d Cir. 1977) ("the disadvantage the defendant suffers because of the prosecutor's failure to call the extra-judicial declarant is not ameliorated by the defendant's ability to call the extra-judicial declarant as his own witness"); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 (3d Cir. 1977) ("a witness whose prior statement is to be used must not only be produced but must also be sworn and made available for cross-examination"); *Simmons v. United States*, 440 F.2d 890, 891 (7th Cir. 1971).[7]

The reasons for rejecting the Eleventh Circuit's rule are several. First, the rule would render almost meaningless the requirement recognized in *Ohio v. Roberts* of a showing of the declarant's unavailability in instances where that requirement still applies after *Inadi*.[8] In most cases, the Government could simply introduce the hearsay statement of a non-appearing declarant, secure in the knowledge that this declarant must either be unavailable

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[7] As the Seventh Circuit stated in *Simmons*, "where an extra-judicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation," the prosecutor must "produce the declarant" for cross-examination. 440 F.2d at 891. *"Mere availability, in the sense that defendant could have subpoenaed him, does not, in our opinion, suffice." Ibid.* (emphasis added); *see also Park v. Huff*, 493 F.2d 923, 934 (5th Cir. 1974), *rev'd on other grounds*, 506 F.2d 849 (*en banc*), *cert. denied*, 423 U.S. 824 (1975); *Hoover v. Beto*, 439 F.2d 913, 924 (5th Cir. 1971), *rev'd on other grounds*, 467 F.2d 516 (*en banc*), *cert. denied*, 409 U.S. 1086 (1972).

[8] As noted above, this Court in *Inadi, supra*, 106 S. Ct. at 1126, limited the scope of the unavailability requirement, but reaffirmed the applicability of such a rule in the context of prosecutorial use of prior testimony by non-appearing declarants. *See also* note 9, *infra*.

(thus satisfying *Roberts*) or available to the prosecution and defense alike (thus eliminating any confrontation issues).

Just as important, the rule would also dispense with the *Roberts* requirement of reliability on the fundamentally unsound premise that a defendant's right to call a hearsay declarant as his own witness is comparable to the right of immediate confrontation through cross-examination. Some of the differences between the two procedures were discussed last Term, in a somewhat different context, by the dissenters in *Inadi*.[9] To begin with, of course, where the defendant's confrontation of his accuser is delayed until after the close of the prosecution's case, the value of the confrontation will be diminished. During the intervening period, "the declarations will be unrebutted in jurors' minds," 106 S. Ct. at 1134 (Marshall, J., dissenting). The defendant's rebuttal of those declarations—which may not take place for days or even weeks after the initial testimony—may simply come too late.

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[9] Nothing in the majority opinion in *Inadi* constitutes a rejection of these concerns. The case involved the introduction of hearsay statements by a co-conspirator who did not appear at trial but was available to appear. The Court held that this type of hearsay, unlike the prior testimony at issue in *Ohio v. Roberts*, may be used at trial without a showing that the declarant is unavailable as a witness. 106 S. Ct. 1129. In so doing, it noted that the defense could have called the witness. *Id.* at 1127-28. The Court did not suggest, however, that the availability of the declarant as a defense witness would eliminate the remaining requirement recognized in *Roberts*—*i.e.*, the requirement of a showing of reliability for statements of declarants who do not appear as prosecution witnesses. On the contrary, the Court stated that the "reliability of the out-of-court statements is not at issue in this case." *Id.* at 1124 n.3. And the dissenters stated without contradiction that the respondent was "free to return to the Court of Appeals and argue that the co-conspirator declarations admitted against him lack the 'indicia of reliability' demanded by the Confrontation Clause." *Id.* at 1129 (Marshall, J., dissenting).

At the same time, it is clear that examinations of hostile witnesses undertaken during the defense case entail greater risks to defendants than cross-examinations of prosecution witnesses. First, there is always the risk that the jury will misunderstand the relationship between the defendant and the witness. Thus, the jury may mistakenly believe that the witness has been called to help the defense case, thus "bolstering in the jury's eyes the very conspiracy allegations [that the defendant] wishes to rebut." *Ibid.* In addition, defense counsel must be concerned that, by bringing up a particular statement a second time, much later in the trial, they may simply enhance the impact of the declarant's original statement. *See ibid.*

Because of these various considerations, it is unlikely that a defendant will even attempt to call as a witness the declarant of hearsay introduced by the prosecution, except in those rare cases where he knows that the witness will recant his former statement or he has concrete evidence to use for impeachment.[10] Yet in federal prosecutions at least, the defense is unlikely even to have the necessary information to challenge the witness, precisely because the declarant never appeared as a prosecution witness and his prior statements therefore need not have been produced. *See ibid.* (citing 18 U.S.C. § 3500). Indeed, there is a very real danger that—recognizing these advantages—prosecutors will exploit this rule by choosing to present the statements of their most unreliable witnesses only through hearsay evidence, rather than calling those witnesses to the stand themselves. In such a case, unless the defense happens to be aware of the declarant's unreliability, it is unlikely to call the prose-

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[10] By contrast, an effective cross-examination of a prosecution witness need not be based on such knowledge or evidence. It may simply suggest to the jury an alternative understanding of the facts that counsel has no substantial evidence to support, or it may seek to discredit the witness generally without focusing on the specific evidence at issue.

cutor's bluff by subpoenaing the declarant as a defense witness. See Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 577-79, 623 & n.155 (1978).

For all of these reasons, "'[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.'" *Inadi, supra*, 106 S. Ct. at 1134 (Marshall, J., dissenting) (quoting *New York Life Insurance Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1945)). Thus, as three circuits have held, the Government should in fairness not be able to sidestep both requirements, satisfying the Sixth Amendment and avoiding the *Roberts* showing simply by pointing to the availability of the declarant as a witness for the defense. Instead, where the prosecution seeks to rely on hearsay evidence, it should have only two choices: (1) produce the declarant for cross-examination at the time the statement is introduced, or (2) satisfy the standards for introduction of statements by non-appearing declarants that are established in *Ohio v. Roberts*.

B. *The Significance of Admissibility Under An Exception to the Hearsay Rule*

In addition to relying on the availability of Wilson as a defense witness, the Eleventh Circuit also rejected petitioners' Confrontation Clause claim on the basis of the fact that Wilson's statements were admissible under the hearsay rule, specifically Fed. R. Evid. 803(3), covering descriptions of "existing mental, emotional or physical condition." Pet. App. 12a. This fact, the court apparently believed, was sufficient to end any further inquiry under *Ohio v. Roberts* into the reliability of the hearsay statements.

In so ruling, the court below was true to the latest precedent in the Eleventh Circuit, *United States v. Wolfe*,

766 F.2d 1525, 1527 (11th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 1379 (1986),[11] as well as the prevailing rule in four other circuits, *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); *United States v. Chindawongse*, 771 F.2d 840, 847 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 859 (1986); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), *modified on other grounds*, 686 F.2d 356 (1982), *cert. denied*, 464 U.S. 965 (1983); *Boone v. Marshall*, 760 F.2d 117, 119 (6th Cir. 1985), where admissible hearsay is automatically deemed "reliable," based in large part on this Court's comment in *Roberts* that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66.

Just last Term, however, four members of this Court took a different approach. Justice Blackmun, dissenting for himself and three other Justices in *Lee v. Illinois*, *supra*, argued that the codefendant's confession at issue there fell within the "firmly established" hearsay exception for "declarations against interest." 106 S. Ct. at 2068. Far from suggesting that this ended the constitutional inquiry, however, the dissenters recognized that "the requirements of the Confrontation Clause and the hearsay rule often diverge." *Ibid.* Admissibility under the rules of evidence, while significant, is but one of the factors to be weighed in the constitutional analysis. *Ibid.*[12]

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[11] We note that an earlier decision in the Eleventh Circuit, involving a state law *res gestae* hearsay exception, went the other way. In *Williams v. Melton*, 733 F.2d 1492, 1495 (11th Cir.), *cert. denied*, 105 S. Ct. 567 (1984), the court held that hearsay admissible under this exception does not automatically satisfy the Confrontation Clause. It undertook its own examination of the reliability of the statements at issue.

[12] The majority in *Lee* did not reach this issue because it did not consider the statement as falling within a firmly rooted exception to the hearsay rule. *Id.* at 2064 & n.5. Nevertheless, the majority

The emerging rule suggested by *Lee* is supported by five circuits that have rejected a conclusive presumption of reliability based on the applicability of a hearsay exception.[13] *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983); *United States v. Ammar*, 714 F.2d 238, 254-57 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983); *United States v. DeLuna*, 763 F.2d 897 (8th Cir.), *cert. denied*, 106 S. Ct. 382 (1985); *United States v. Ordonez*, 722 F.2d 530, 535 (9th Cir. 1983); *United States v. Young*, 736 F.2d 565, 569 (10th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 1038 (1985).[14] Thus, if petitioners had been tried in one of

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also recognized the possibility that hearsay could be admissible under rules of evidence yet run afoul of the Confrontation Clause. *Id.* at 2061.

[13] The existence of this conflict among the circuits has been twice recognized by members of this Court. *See United States v. Inadi*, *supra*, 106 S. Ct. at 1129 n.1 (Marshall, J., dissenting); *Sanson v. United States*, 467 U.S. 1264 (1984) (White, J., dissenting from denial of writ of certiorari).

[14] The final circuit that has spoken on this issue, the Seventh, appears to be completely confused. *Compare United States v. Keplinger*, 776 F.2d 678, 695 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2919 (1986) (admissibly under hearsay rules "does not eliminate the need to evaluate whether admission of the statement contravenes the defendant's right of confrontation"), *and Mattes v. Gagnon*, 700 F.2d 1096, 1101 (7th Cir. 1983) (same), *with United States v. Molt*, 758 F.2d 1198, 1199 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986) (admissibility under hearsay rules disposes of Sixth Amendment claim), *and United States v. Williams*, 737 F.2d 594, 610 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985) (same).

We note that most of the cases cited here involve the co-conspirator hearsay rule in Fed. R. Evid. 801(d)(2)(E). Technically speaking, that rule treats the statements of co-conspirators made in furtherance of the conspiracy as "non-hearsay" rather than an exception to the hearsay rule. However, because co-conspirator statements are hearsay in every practical sense, they are treated as an *exception* to the hearsay rule for purposes of analysis under the Confrontation Clause. *See United States v.*

these circuits, they would have had at least the opportunity to challenge the reliability of admitting Wilson's statements linking them to organized crime through Williams and Tritt.[15] The opportunity denied to petitioners Grassi and Santarelli in the Eleventh Circuit was by no means a technical or inconsequential shortcoming. After all, admissibility under the general hearsay rules is hardly a guarantee of reliability in every particular case. As a result, there is a real danger that, whenever a statement fits within a hearsay exception, the Government will seek to use essentially unreliable and inflammatory evidence against a defendant, knowing that he will not be able to undermine its effect on the jury because the declarant will not be there to be cross-examined.

This danger is vastly increased, of course, in those areas where the requirement of unavailability does not apply. In these circumstances, the prosecution may have full access to and control over the declarant, and may know that he would no longer affirm the truth of some key comment he had formerly made if put to the test of live examination. Absent some requirement to prove the reliability of the hearsay, however, the Government would be free to introduce this questionable testimony as hearsay through another witness, secure in the knowledge that the defense is unlikely to risk summoning the declarant as its own witness.

Inadi, supra, 106 S. Ct. at 1128 n.12; *United States v. Caputo*, 758 F.2d 944, 951 (3d Cir. 1985), *vacated*, 791 F.2d 37 (1986).

[15] Arguably, he would also have been able to rely on the *Roberts* requirement that the government show the unavailability of the declarant—depending on how broadly one reads the decision in *Inadi*. In *Inadi*, the Court did not reach the question whether unavailability should be required where statements are being introduced as descriptions of present mental state under Fed. R. Evid. 803(3). It ruled solely on the issue of co-conspirator hearsay declarations. To the extent that unavailability is required in the present context, it is undisputed that the Government failed to meet this requirement.

The facts of this case illustrate these dangers well. First, there is ample reason for concern that Wilson may have fabricated a link between petitioners and the Mafia in order to induce Williams to acquiese in petitioner Santarelli's request for a percentage of their enterprise. This concern is underscored by the Government's deliberate decision to offer these statements only through another witness, Williams, who could not even be challenged about whether Wilson truly believed the allegations, much less whether they were true.

Wilson's possible motive for fabrication stems from the fact that Santarelli's initial involvement in the tax-shelter scheme was through a loan to Wilson, for Wilson's own investment in the scheme. Although Williams understood that his partner had repaid this loan with interest, Tr. vol. 4, at 123, other statements in the record suggest a different scenario: that Santarelli had offered a no-interest loan, as well as introductions to key figures in the Bahamas that were to be repaid with a percentage of the enterprise itself. According to Tritt, Santarelli had told Wilson that when the business "got good and healthy, and they were able to pay their bills" they should not forget "Uncle Dom." Tr. vol. 4, at 123.

Williams, however, testified at trial that he did not know the terms of the arrangement between Santarelli and Wilson, and that he had expressly told Wilson to keep him out of any such arrangements. Tr. vol. 4, at 91, vol. 5, at 6, 7. As a result, if Wilson in fact made a commitment to give Santarelli a percentage, as the evidence suggests, or felt that this result was fair in light of the success of the enterprise, he would have had to find some way to cajole Williams into agreeing to the arrangement. Indeed, the record suggests that Wilson tried two alternative approaches concurrently. First, Wilson argued the equities, telling Williams, in the key

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[16] In his testimony, Tritt quoted petitioner Santarelli as saying that the loan carried no interest. Tr. vol. 3, at 58, 59.

conversation: "Look you know, they were there when we needed them. I got my money when I needed it. They helped us with the people that needed to be got at in Nassau, set up a trust company and everything else." Pet. App. 4a. Only after this avenue was rebuffed did he attempt to depict petitioners as threatening underworld figures who could not be denied. Quite obviously, if the second approach fairly portrayed his true state of mind, the first was beside the point.

All of this could have been explored effectively on cross-examination if the Government had put Wilson on the stand to describe his own fears of petitioner and their source. But since Williams was the only witness, no such examination was possible. In such circumstances, there was clear reason to doubt the reliability of the hearsay testimony. And, as we have suggested, these doubts are magnified by the fact that Wilson was fully available to be called as a Government witness. Wilson thus could have explained his own motives in detail, without raising any possible Confrontation Clause issue. Yet the prosecution chose not to call Wilson, preferring to introduce his hearsay statements through another witness who was effectively immune from the rigors of cross-examination on these issues.

In sum, the fact that the Eleventh Circuit, unlike five other circuits, conclusively presumes reliability from admissibility under the hearsay rules, was hardly irrelevant on the facts of this case. This is an issue that should be resolved by this Court.

II. The Court Admitted the Evidence Linking Petitioners with Organized Crime Without Undertaking the Full Weighing of Probative Value and Prejudicial Effect Mandated by the Federal Rules of Evidence

The second set of issues raised in this case involves the proper use of reputation evidence in prosecutions under the Hobbs Act. The Government's use of testi-

mony linking the defendants to organized crime is typical of prosecutions under this statute. The courts routinely admit such evidence, without undertaking any serious inquiry into whether its probative value in the particular circumstances of the case outweighs the clear possibilities for unfair prejudice. This is a pattern that must be corrected.

"Extortion" under the Hobbs Act has two related elements: subjective fear of harm on the part of the alleged victim, and an effort to exploit that fear by the defendant.[17] When the Government seeks to introduce testimony about what the victim said or heard about the defendant, the courts focus on the former issue and typically conclude that the reputation evidence is relevant to show the "state of mind" of the victim. *See, e.g., United States v. Curcio*, 759 F.2d 237, 241 (2d Cir.), *cert. denied*, 106 S. Ct. 142 (1985); *United States v. Adcock*, 558 F.2d 397, 404 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Billingsley*, 474 F.2d 63, 66 (6th Cir.), *cert. denied*, 414 U.S. 819 (1973); *United States v. Hyde, supra*, 448 F.2d at 845. While this is true as far as it goes, mere relevance, by itself, is not sufficient to justify admission of this kind of highly inflammatory testimony. In the first place, there must, of course, be some evidence linking the victim's fear to some action or reliance by the defendant. Additionally, under Fed. R. Evid. 403, the probative value of the evidence must be weighed against its potential prejudicial effects in the context of a given case. In effect, in Hobbs Act cases, the courts have abandoned the careful weighing

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[17] *United States v. Haimowitz*, 725 F.2d 1561, 1572 (11th Cir.), *cert. denied*, 105 S. Ct. 563 (1984); *United States v. Duhon*, 565 F.2d 345, 351 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978). The statute defines extortion as "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

required by Rule 403, and replaced it with a virtually conclusive presumption that every negative statement about the defendant that was made or heard by the victim, however inflammatory or unreliable, is admissible into evidence to show state of mind.

The circumstances of the present case illustrate this problem. In its ruling from the bench, the district court focused almost exclusively on the admissibility of the organized crime allegations under the *hearsay* rules. Pet. App. 19a-21a. Its ruling under Rule 403 was confined to a single sentence, which offered no analysis whatever of the actual facts and circumstances of the case.[18] Nor had the Government, in its arguments for admitting the statements, offered any explanation of why this evidence was so essential that its probative value outweighed any potential prejudice. The Eleventh Circuit, in turn, gave only the most cursory attention to petitioners' Rule 403 claim. Pet. App. 14a-15a.

There are two reasons for concern about this *pro forma* approach to the Rule 403 issue in Hobbs Act cases. The first stems from the nature of the evidence involved. When the Government seeks to rely, in an extortion case, on statements made or heard by the victim that demonstrate his fear of the defendant, those statement generally will entail a high degree of potential prejudice. Under our system of criminal justice, it has long been considered highly prejudicial to seek to prove a defendants' guilt by pointing to his character, reputation or prior conduct. *See* Fed. R. Evid. 404. Yet in Hobbs Act cases, because Congress made the victim's "state of mind" an element of the crime, juries are allowed to hear all sorts of allegations of this kind, including perhaps the most preju-

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[18] The court simply stated that "I have also applied Rule 403 and weighed the relative affects on both the defendants and the Government, and I do feel that in view of the difficulty in proving a state of mind, which is an essential element here, that it is necessary for the Government's case." Pet. App. 21a.

dicial possible form of character evidence—an allegation of organized crime involvement.[19]

These general concerns are greatly enhanced when one looks to the nature of the specific issues presented to the jury in a Hobbs Act case. As we have noted, there are two elements of Hobbs Act extortion—subjective fear and an effort to exploit that fear. These elements are closely related, since the same conduct on the part of the defendant may be innocent or extortionate depending on the information the alleged victim had in his mind and how he was likely to react. The risk is that a finding of subjective fear will, in certain circumstances, be unfairly "bootstrapped" into a finding of extortionate conduct on the part of the defendant. This may occur where (1) the prosecution seeks to prove the state of mind of the alleged victim by introducing statements he made or heard, and (2) those statements reflect the victim's knowledge of specific facts that the defendant neither communicated to him nor had reason to expect him to learn about. In such a case, there is a danger that jury will "read" the defendant's conduct in light of the information that the

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[19] Numerous courts have recognized that a suggestion of a link between a defendant and organized crime creates a grave danger of tainting a jury's consideration of the case. *United States v. Bruscino*, 662 F.2d 450, 458-59 (7th Cir. 1981), *cert. denied*, 459 U.S. 1211, 1228 (1983) (conviction reversed where jury accidentally saw unadmitted exhibit linking defendant to "Mexican mafia"); *United States v. Love*, 534 F.2d 87, 89 (6th Cir. 1976) (conviction reversed where prosecutor suggested Mafia link in questioning); *United States v. Perry*, 512 F.2d 805, 806-07 (6th Cir. 1975) (plainly prejudicial for prosecutor to ask defendant whether he was member of "Dixie Mafia"); *United States v. Holmes*, 767 F.2d 820, 824 (11th Cir. 1985) (improper and potentially prejudicial to elicit testimony linking defendant with Mafia). *See generally* J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[03], at 403-40 to -41 (1985) ("Particular difficulties arise where the proffered evidence connects a party with a highly charged public issue, such as communism, *organized crime*, or narcotics.") (citations omitted; emphasis added).

victim had received, and blame the defendant for "exploiting" a fear that the defendant had no way of knowing about.

In this case, for example, the only conduct attributed to petitioner and his co-defendant was reasonably ambiguous. It could have been interpreted as coercive, but Williams himself testified that this conduct had not caused him to fear the defendants or want to give them any money. Tr. vol. 5, at 37-41. The key event was the fact that the alleged victims somewhere received the impression that the defendants were involved with the Mafia. Because of this information, Wilson, and ultimately Williams as well, understood petitioner Santarelli's request for a share in their operations as a demand that they could not safely refuse. Yet as far as the record reveals, Santarelli had no knowledge whatever that he was perceived as a member of organized crime by Williams and Wilson. As a result, there is real reason for concern here that the fear generated in the minds of the alleged victims by third-party comments was what led the jury to "interpret" the defendants' conduct as extortionate.[20] If so, then the hearsay evidence introduced solely to show the state of mind of the alleged victims became the determining factor on the overall issue of the defendants' guilt or innocence.

In light of these concerns, it is clear that courts should be far more vigilant than they have been in the past in scrutinizing the probative value and prejudicial effects of reputation evidence in Hobbs Act cases. Such evidence, of course, is quite appropriate where the Government

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[20] The court instructed the jury that the statements about organized crimes were only to be considered to show the victims' state of mind. Pet. App. 22a. Although there is a general assumption "that jurors are able to follow the court's instructions," *Tennessee v. Street, supra,* 105 S. Ct. at 2082 n.6, Rule 403 would hardly be necessary if the prejudicial effects of evidence would always be purged by instructions to the jury.

can show evidence that the defendants, or their agents, "brought home" to the victim of their own propensity toward violence. *See United States v. Tropiano*, 418 F.2d 1069, 1081 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). And the same is true where a particular defendant has such a general reputation for criminality that he had reason to anticipate that the victims would interpret his statements and actions in that light. *See Carbo v. United States*, 314 F.2d 718, 740-41 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

But where, as here, the Government does not show that the allegations about the defendant received by the victim were known to the defendant, it should not be able to introduce those allegations simply by arguing their relevance as indications of the victim's state of mind. At minimum, there should be some preliminary showing that defendants affirmatively advised or relied upon the reputation testimony that the Government seeks to admit.[21] The prosecution should, additionally, be required to show that this type of evidence is essential to its case—*i.e.*, is needed to establish the victim's fear, rather than merely cumulative of other evidence showing the same thing.[22] Absent such a showing, the clear danger of un-

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[21] In the analogous context of co-conspirator hearsay, the courts have been particularly sensitive to the risks of conditionally admitting statements that, like those at issue here, depend ultimately for the admissibility on the proof of other facts. *See, e.g., United States v. Vinsen*, 606 F.2d 149, 152-53 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074, 445 U.S. 904 (1980); *United States v. James*, 590 F.2d 575, 582 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

[22] Frequently, the state of mind of the alleged victim can be demonstrated without resorting to hearsay statements concerning bad reputation. For example, the victim can testify to his state of mind without relating the statements made to him concerning the defendant's reputation. Alternatively, there can be testimony by others that the victim said he was afraid or demonstrated his fear through his demeanor or other actions. Indeed, the victim's fearful state of mind can be inferred from the words and acts of

fair prejudice created by this kind of evidence necessarily requires its exclusion under Rule 403.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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the defendant, and in many cases, the very fact that the victim transferred property to the defendant will be strong circumstantial evidence of his fear.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-5403

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANTE GRASSI, DOMINIC SANTARELLI,
Defendants-Appellants.

March 13, 1986

Appeals from the United States District Court
for the Southern District of Florida

Before HILL and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Appellants Grassi and Santarelli appeal their conviction of violating the Hobbs Act, 18 U.S.C. § 1951 by extorting money from Robert G. Wilson, Richard Gwenn Williams, and Federal Bank and Trust Company, Ltd.

I. STATEMENT OF THE CASE

In mid-1978, Wilson and Williams organized a tax shelter program for United States citizens. This shelter involved the use of off-shore Bahamian corporations and

banks. Although it purported to create tax shelters through the buying and selling of T-bills and Ginny Mae mortgages through a trader named Charles Tritt, Wilson, Williams, and Tritt had no intention of actually trading, but merely set up paper transactions to give the appearance of a legitimate operation through an entity in the Bahamas entitled the Federal Bank and Trust Company, Ltd. This tax shelter is the subject of an independent indictment.

Initially, the shelter was faltering because of a lack of funds and corporate entities. Wilson then turned for help to appellant Santarelli who lived in Wilson's Ft. Lauderdale neighborhood and who had loaned him money on other occasions.

Santarelli loaned Wilson an undisclosed amount of money and introduced him and Williams to several people in the Bahamas who helped them to set up corporations involved in the tax shelter scheme. One such Bahamian was Clement Pinder. Through Pinder, Wilson and Williams arranged for a Bahamian accounting firm to "audit" bogus confirmation slips and for an offshore trust company to be a conduit for the fees for the sale of phoney tax losses.

In late 1978, the tax shelter began to generate a large amount of cash and by January 1979, Wilson had repaid the loan to Santarelli. As a result of the venture's success, Wilson and Williams began looking into various other investments in the United States and in the Bahamas. They approached Clement Pinder about the prospect of establishing a lottery in the Bahamas.

Appellant Santarelli found out about this meeting with Pinder in March 1979 when he had drinks with Charles Tritt and one of Tritt's companions at the Brittania Beach Hotel in Nassau, Bahamas. Santarelli became upset that Wilson and Williams had contacted Pinder about establishing a national lottery without first consult-

ing him. He felt they should have asked whether he was interested and that their approaching Pinder was an improper use of his introduction. Santarelli stated, "I'm going to go upstairs and call Florida and tell those two bastards to get over here for a meeting."

Shortly thereafter, appellant Grassi, who lived a short distance from Wilson in Ft. Lauderdale, telephoned Wilson and told him and Williams to come to his apartment. At this time, Wilson and his wife were having dinner with Williams and his female companion. Wilson and Williams left immediately to go to appellant Grassi's apartment.

At Grassi's apartment, Grassi told Wilson and Williams that Santarelli was upset about their attempt to set up a lottery program with the use of Santarelli's contacts in the Bahamas without telling him. Williams noted that the money borrowed from Santarelli by Wilson had been repaid with interest and that he felt no need to consult him. Grassi then slapped Williams twice and stated, "You got to show respect." Wilson stepped between the two men, stating that Williams should leave matters to him and that they would meet with Santarelli in the Bahamas two days later. Later that night, Williams told his female companion that he and Wilson had gone to see Mafia people and that Mrs. Wilson had told him that Wilson had been very upset after returning from Grassi's apartment and that Wilson had cried.

On the second day thereafter, Wilson and Williams flew to the Bahamas to meet with Santarelli. Grassi was present during the meeting but did not participate in the discussions. Santarelli explained that Wilson and Williams should have consulted him before they approached his friend Pinder about the lottery venture. He stated that they "had made him look like a fool with his people in the Bahamas, and that he was going to take a piece of the Bank." At that point, Williams asked if Santarelli

was taking 5% of the tax shelter scheme. Santarelli jabbed his finger into Williams' chest and said, "No. I'm taking one-third." Williams then began to argue, at which point Wilson again intervened and took him into the next room. Out of the presence of Santarelli and Grassi, the following conversation took place as testified to by Williams:

Q. State what was said, sir.

A. Well, Bob took me into the other room and said, "Look, let me handle this."

I said, "Bob, what are you talking about? You're talking about somebody taking a whole one-third of the bank," and I said, "We're going [sic] all the work."

I said, "You know, it just doesn't seem fair to me."

He said, "Look you know, they were there when we wanted them. I got my money when I needed it. They helped us with the people that needed to be got at in Nassau, set up the trust company and everything else."

He said, "Let me handle it. Let me work it out."

I said, "Well, I think that a third is just too much."

I said, "You know, okay, maybe for that we ought to give away, maybe, ten percent, I don't know, but a third sounds like one hell of a lot to me."

So, he said, "Well, look, I don't know about you, but I got kids and I don't intend to argue."

So, he said, "I"—he said, "You don't argue with people like this. If they say they want a third, they're going to take a third and what the hell are you going to do about it."

So, I didn't do anything about it.

Q. What did you say?

A. I said, "Well, if you really think that's true, then I guess I've got to go along with what you say."

Wilson and Williams returned to the room and told Santarelli that they were agreeable to his having that percentage. They shook hands, and Santarelli apologized for what had happened at Grassi's apartment.

Upon leaving the suite, Wilson and Williams proceeded to Tritt's room where the three discussed various ways in which they could reduce the net profit figure that would be shown in the company in order to lessen the share that Santarelli would receive. Wilson decided that they had better not do this because Santarelli would find out about it and they would have "nothing but problems." He said to Tritt and Williams: "Just let it go. We'll pay the money."

Shortly after this meeting, Santarelli told Tritt that he had "straightened" Wilson and Williams out and that he was taking a third of their profits, and that Williams "was a little rambunctious and that he had slapped him in the mouth once or twice."

Santarelli also told another person, McKinney, that "he was very upset with Mr. Wilson, that he had to slap him to remind him who was in charge" and that "that was a way he could get respect from him."

Subsequently, Williams testified that in early 1980, he caused approximately 1.4 million dollars to be transferred into a Bahamian corporation owned and controlled by Santarelli as payment of his share of the program's 1979 profits. Additionally, over objection, the government introduced evidence that Santarelli received approximately $200,000 through investments Wilson and Williams made in a company known as Casino Records. Finally, Williams testified that Wilson said that Santarelli requested them to invest approximately $250,000 in a night club in Miami, Casino de Paris.

II. ISSUES

We conclude that only the following issues merit consideration on this appeal.

1. Whether the evidence is sufficient to support appellants' conviction for violation of the Hobbs Act.

2. Whether the trial court erred in denying appellants' requested jury instruction on the definition of extortion.

3. (a) Whether the district court erred in admitting evidence of appellants' Mafia reputation for the purpose of showing the victims' fear.

   (b) Whether the appellants' Sixth Amendment confrontation rights were denied by the method used to prove appellants' Mafia reputation.

   (c) Whether evidence of Mafia reputation should have been excluded under Rule 403 F.R.C.P.

4. Whether the district court was clearly erroneous in finding appellant Santarelli's out-of-court statements admissible against appellant Grassi under Federal Rule of Evidence 801(d)(2)(E).

III. DISCUSSION

(1) *Sufficiency of the Evidence*

Appellants cite a number of cases for the proposition that "where the defendant does not threaten the victim, or instill fear, the defendant must, at a minimum, knowingly exploit a fear the victim harbors." *United States v. Haimowitz*, 725 F.2d 1561, 1572 (11th Cir.1984); *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir.1980); *United States v. Duhon*, 565 F.2d 345, 351 (5th Cir. 1978); *United States v. Russo*, 708 F.2d 209, 214 (6th Cir.1983). They then argue that it would have been im-

possible for them to exploit Wilson's and Williams' fear because there was no proof that they were aware of this fear.

Appellants argue that the evidence is insufficient to support the convictions because they said and did nothing to create fear in the alleged victims, Wilson and Williams. Santarelli says, for instance, that there is no evidence that he instructed Grassi to slap Williams. Furthermore, Williams testified that Santarelli's jabbing his finger in Williams' chest at the meeting in the Bahamas did not create fear in him. They contend that what induced fear in Williams was the statements made by Wilson that Santarelli had Mafia connections and that Santarelli was not the type of person they should make angry. These statements were made out of the presence of Santarelli, and there is no evidence that Santarelli was aware of these statements having been made.

The first difficulty we find with this argument is that it is plain on the record that a jury could well infer from the conduct of Grassi and Santarelli that they did actually "threaten the victim or instill fear" in the victims themselves. Moreover, the record before us also contains evidence from which the jury could well infer that the appellants actually exploited the alleged victims' fear.

It is plain that there was sufficient evidence to support the trial court's determination that Grassi and Santarelli were engaged in a common enterprise and that, therefore, the acts of one could be attributed by the jury to the other. *United States v. James*, 590 F.2d 575 (5th Cir. 1979). We are presented with the following scenario: When Santarelli learned of Wilson's and Williams' discussions with his contact, Pinder, he stated: "I'm going to go upstairs and call Florida and *tell* those two bastards *to get* over here for a meeting." (Emphasis supplied.) Immediately thereafter, Grassi, who lived a short distance from Wilson in Ft. Lauderdale, telephoned Wilson and told him and Williams to come to his apartment. They

left a party and went immediately to Grassi's apartment. There, Grassi told them that Santarelli was upset about their using Santarelli's connections in the Bahamas without telling him. Williams attempted to argue and Grassi then slapped him a couple of times hard enough to raise welts and bruises on his face, saying, "you got to show respect." Wilson intervened to prevent Williams from engaging in a fight and persuaded Williams to agree to go to the Bahamas to see Santarelli two days later, which they did.

From the meeting at Grassi's apartment, and from what other facts Wilson knew of Grassi and/or Santarelli,[1] all of whom lived in the same neighborhood in Ft. Lauderdale, Wilson was convinced, and stated to his wife, that they had been with Mafia people, following which he broke down and cried.

Moreover, there is ample evidence from which the jury could find the defendants both exploited the alleged victims' fear. There is no question but that Wilson's fear was apparent the night of his meeting with Grassi. This was later exploited when, in response to Grassi's demand they flew to the Bahamas two days later to meet Santarelli. There, Grassi, who had already slapped Williams and told him to "show respect" was in the room when Santarelli made his statement that he was "*taking*" a third of the business. Neither appellants nor the United States calls our attention to any place in the record where there was evidence that Santarelli had either slapped Williams or Wilson. When Santarelli thereafter told Tritt that he had done so, it is not clear whether he had at some time slapped Williams and/or Wilson himself or whether he was merely adopting the action of Grassi as his own. He said that Williams "was a little rambunctious and that

---

[1] Among the other facts they knew of Santarelli was the fact that they had borrowed start-up money for their tax scheme and had paid it back with interest and that Santarelli was reported to be "loan-sharking" and reported to have "underworld" connections.

he had slapped him in the mouth once or twice" and made the further statement that "he was very upset with Mr. Wilson, and that he had to slap him to remind him who was in charge" and that "that was a way he could get respect from him." There could be no question but that the jury could infer that such conduct by Santarelli and Grassi exploited the fear that had already been created at least in Wilson's mind.

Although it is true that Williams testified that the occurrence in Grassi's apartment did not scare him, since he was accustomed to looking out for himself, there was ample evidence that the conduct by Grassi and Santarelli together, before Williams agreed to surrender one-third of the business, created and exploited fear in him to resist Santarelli's demand.[2]

With respect to Grassi's separate argument as to the sufficiency of the evidence, we agree with the government's contention that Grassi's part in setting up the scheme in the Bahamas, after himself acting like a gangster, slapping Williams and telling him that he had to "show respect" [3] made him at least an aider or abettor in Santarelli's crime.

---

[2] As to the state of Williams' mind in surrendering payments to Santarelli, there is the following testimony:

Q. Why did you consent to make the transfer, the initial $50,000 transfer, to Casino de Paris?

A. Same reason that I consented to Mr. Santarelli becoming a one-third partner in the Federal Bank and Trust?

Q. What was that reason?

A. That I had little choice in the matter.

Q. Why?

A. Because I felt that if I did not agree, that it might be extremely dangerous for me not to.

[3] This term, while possibly not to be taken by judicial notice to be mobster language and seems to us to be such, since the same words were later used by Santarelli, who bragged to other persons of having slapped Williams and Wilson, to make him "show respect."

(2) *Jury Instruction on Extortion*

The trial judge gave the following jury instructions:

> The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the defendant induced the person described in the indictment to part with property;
>
> Second, that the *defendant did so knowingly and willingly by means of extortion,* as hereinafter defined; and
>
> Third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.
>
> "Extortion" means to obtain property from someone else with his consent, but whose consent is brought about or induced by the wrongful use of actual or threatened force, violence, or fear.
>
> The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.
>
> The term "fear" means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss as well as fear of physical violence.
>
> The term "wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it. (Emphasis added.)

Appellants moved the court to modify the jury instruction by defining extortion to read: "Extortion means to obtain property from someone else with his consent, but whose consent is brought about by [a defendant's] wrongful use of actual threatened force, violence or fear." (Bracketed words not in instruction given to jury). Ap-

pellants argue that under the instruction given, it was possible for a jury to find appellants guilty even if they believed the defendants themselves never exploited their alleged Mafia reputation. They contend that even if the jury instruction was proper, the trial court erred by refusing to give the instruction as a theory of the defense.

We find no merit in this claim. The court charged that in order for the jury to find him guilty, they would have to find beyond a reasonable doubt that the defendant induced the person described in the indictment to part with property knowingly and willingly *by means of extortion*, "as hereinafter defined"; then the definition of extortion merely describes the meaning of extortion. It is clear that the court charged that the inducing by the wrongful use of actual or threatened force, violence or fear must be by the defendants. The fact that this must have been done by the defendant is amply covered by the part of the charge stating what the defendants must knowingly and willingly have done. The court's charge made it perfectly clear that the act of extortion must have been done by these defendants. Such a charge also clearly satisfied the requirement that the jury must be charged as to the defendant's theory that they were not responsible. It told them that the illegal acts of threat or exploitation must be acts of these defendants and not of anyone else.

(3) *Evidence of Mafia Reputation*

(a) The district court admitted over objection out-of-court statements by Wilson concerning his fear of appellants in his belief that they were "loan sharks" and connected with the mob or Mafia. Appellants contend that there was no evidence of threats or exploitation. These statements were introduced through the testimony of Williams and Tritt, on the theory that they showed the

alleged victims' state of mind and thus were not hearsay but were admissible under Rule 803(3) F.R.Evid.[4]

As we have already held that there was evidence to show that Santarelli and Grassi intentionally threatened and exploited Wilson's fear, we find no merit in their contention that such evidence was lacking and that the evidence should therefore not have been admitted.

(b) *The Sixth Amendment Confrontation Issue*

Appellants contend that even though the statements above referred to were admissible either as exceptions to the hearsay rule or as not being hearsay, they were denied the rights of confrontation of the witness, Wilson, whom Williams quoted as having made the statements as to the fear induced by the defendants and by their reputation. The trial court told the jury that this evidence was admitted only as evidence of the victims' state of mind. This issue has been discussed in the case of the Court of Appeals for the Fifth Circuit, by which we are bound,[5] *United States v. Hyde*, 448 F.2d 815 (5th Cir.1971), which stated:

> The victim's fearful state of mind is a crucial element in proving extortion. The testimony of victims

---

[4] This rule states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) *The existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

as to what others said to them, and the testimony of others as to what they said to victims is admitted not for the truth of the information in the statements but for the fact that the victim heard them and that they would have tended to produce fear in his mind. As Professor Wigmore has pointed out:

> Wherever an utterance is offered to evidence of the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned. (Emphasis in original.)

Wigmore, Evidence § 1789 (1940). *See Nick v. United States* [122 F.2d 660 (8th Cir.1941)] *supra.* Thus it is no ground for objection that the third person making the statement to the victim is not produced as a witness or even that he is not named. The defendant's right of cross examination is preserved in that he can ask the witness whether he truly heard these fear-producing statements.

It is noted that the *Hyde* opinion dealt with the confrontation issue where it stated: "the defendant's right of cross-examination is preserved in that he can ask the witness whether he truly heard these fear-producing statements."

Moreover, the defendant's right of confrontation was further preserved to them in this case, since Wilson had been granted immunity to testify, had been interviewed by the defendants who found him "cooperative" but who then decided not to call him as a witness.

We conclude that the circumstances of this case satisfied the confrontation requirement, which the Supreme Court described as "substantial compliance with the purposes behind the confrontation requirement." *Ohio v. Roberts*, 448 U.S. 56, 69, 100 S.Ct. 2531, 2540, 65 L.Ed.2d

597 (1979), where the Court quoted from *California v. Green*, 399 U.S. 149 at 155, 90 S.Ct. 1930, 1933, 26 L.Ed. 2d 489. The production of the witness Wilson and the grant to him of immunity also made it possible for the defendants to examine him to their heart's content if they had chosen to do so.

(c) We also conclude that there is no merit in Santarelli's contention that this evidence should have been excluded under Rule 403 because of its highly prejudicial nature and low probative value.[6] This Court's consistent holdings that Rule 403 is an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence, is best stated in *United States v. Meester*, 762 F.2d 867, 985 (11th Cir.1985):

> The United States Court of Appeals for the Fifth Circuit stated in *United States v. McRae*, 593 F.2d 700 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979)[5] that:

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

> > Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative pro-

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[6] Federal Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> bative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance. It is not designed to permit the court to "even out" the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none.

Id. at 707 (emphasis in original.)

762 F.2d at 875.

The standard of review of such refusal of the trial court to exclude evidence under Section 403 is abuse of discretion. We do not find that the trial court here abused its discretion in refusing to exclude this evidence.

(4) *Santarelli's Out-of-Court Statements as Admissible Against Grassi Under Federal Rule of Evidence 801(d)(2)(E)*

This Rule provides:

> A statement is not hearsay if—
>
> (2) The statement is offered against a party and is . . . a statement by a co-conspirator of a party during and in furtherance of the conspiracy.

We have already decided that there was sufficient evidence from which the jury could decide that Grassi and Santarelli were engaged in a conspiracy under *James*. As pointed out by the government, the statements objected to by Grassi were in furtherance of the conspiracy, because from these statements a jury could well infer that they were made for the purpose of further threatening or exploiting existing fears of the victims.

IV. CONCLUSION

The judgments of conviction and sentences are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
50 Spring Street S.W.
Atlanta, Georgia 30303-3147

June 4, 1986

Spencer D. Mercer
Clerk

TO ALL PARTIES LISTED BELOW:

No. 85-5403
USA vs. GRASSI, et al.
D.C. Docket No. 84-855-CR-SMA

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

— The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

xx No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

SPENCER D. MERCER
Clerk

By: /s/ Karen B. Sinyard
Deputy Clerk

cc: Thomas F. Almon
E. David Rosen
John B. Anderson
Bohn Phillips, AUSA/Miami
Vincent L. Gambale

APPENDIX C

EXCERPTS FROM TRIAL TRANSCRIPT

[4-24] MR. PHILLIPS: Yes, Your Honor.

United States versus Hyde, I would submit, the Fifth Circuit case which is still the law to my knowledge, states that the victim's fearful state of mind is a crucial element in proving extortion; that the testimony of victims, as to what others said to them, and the testimony of others, as to what they said to victims, is admitted not for the truth of the information in the statements, but for the fact that the victim heard them and that they would have tended to produce fear in his mind.

I would submit, Your Honor, that the hearsay testimony is admissible on that basis.

THE COURT: Mr. Rosen?

MR. ROSEN: If Your Honor please, I think we have to look at the facts in the case as opposed to the facts in this case, and the facts in this case, as I recall the Hyde case, are substantially different; where two businessmen get into a conversation, both of them alleged to be victims, and the one victim allegedly saying to the other, "We have to pay, because this man is in organized crime."

I do believe, Your Honor, that considering where we are, the posture we are in in this case, [4-25] it is substantially different.

I can recognize the general proposition of law that Mr. Williams mentions, but the propositions of law have to be applied to the facts of the case, and needless to say, Your Honor, the way the Government has presented its case would appear that this evidence could and would be a crucial point, turning point in this case, and I submit it would be fundamentally unfair under the facts of this case to permit that kind of evidence to go to this jury.

I might point out, Your Honor, we had Mr. Tritt on the witness stand yesterday. He never said—he was never asked and he never said he—of course, this is argument for the jury, possibly, but he never said that he told them anything.

THE COURT: Mr. Almon.

MR. ALMON: I can't add much to that.

I think under 403, there is—even if there is some—I understand the general proposition, too, but there is prejudice that would be involved in just throwing out the term "organized crime, underworld figures." The whole case will turn on it.

There is no way that a jury can—if you give the instruction that's required by the cases anyway, after each time, I just don't think there is any way [4-26] that the jury can separate the two at this point.

There is plenty of evidence that's going to come in through Mr. Williams that he was physically assaulted. He's going to say that Mr. Grassi physically hit him. He's going to say that Mr. Santarelli pushed him with his finger.

Now, that's what the Government is relying on with regard to fear in this case. They're not relying on reputation, everybody in the community coming up to Mr. Williams and saying, "Look, these guys down the block, they're the mafia," or anything else like that.

They're relying on the actual physical acts. That's sufficient. That's what they alleged in terms of proving the extortion, and I would move to exclude any reputation testimony because of the danger of prejudice that's involved with it.

THE COURT: It is the responsibility of the Court to apply the law as it is. I didn't make the law. I'm not saying I necessarily disagree with it, either, but it does

seem clear that the nature and type of testimony sought to be offered through this witness, as just adduced on the witness stand, is admissible under proper and appropriate instructions to the jury, limiting the use of it to state of mind [4-27] and/or fear-type of situations, which the jury can either accept or reject in terms of credibility and/or weight, and with appropriate instruction, that the testimony is not coming in for the truth of the facts or the matters.

United States versus Hyde, 448 Federal Second 815, a leading case in the Fifth Circuit, 1971, at Page 845 has this to say:

"Hobbs Act cases have previously approved allowing similar testimony as bearing on the victim's state of mind," stating a number of cases.

"The statute does not require an explicit threat from the defendant," quoting from U.S. v. Tolub, 309 Federal Second at 289. "It requires only that the defendant induces victim to part with property through the use of fear. 18 U.S.C. Section 1951(b)(2).

"The jury is permitted to find such inducement by use of fear from the testimony as to the state of mind of the victim. The victim's fearful state of mind is a crucial element in proving extortion.

"The testimony of victims as to what others said to them and the testimony of others as to what they said to victims is admitted not for the truth of the information in the statements but for the fact [4-28] that the victim heard them and that they would have tended to produce fear in his mind."

Then there's a quotation from Wigmore, following which the Court says: "Thus, it is no ground for objection that the third person making the statement to the victim is not produced as a witness or even that he is not named.

"The defendant's right of cross-examination is preserved in that he can ask the witness whether he truly heard these fear-producing statements.

"Such testimony may not be used to show that the defendants, in fact, made threats or otherwise made use of such fear in convincing the victims to pay.

"The jury here was properly instructed to consider the testimony only in determining the victims' state of mind."

United States versus Russo, Ninth Circuit case, 708 Federal Second 209, 1983 case, also supports that.

There are several other cases which also permit the use of the terminology such as "underworld mob" or "mafia," where the proper instructions are given to the jury with regard to the limited use of the evidence.

[4-29] So, the ruling of the Court is the evidence is admissible and, in so doing, I have also applied Rule 403 and weighed the relative affects on both the defendants and the Government, and I do feel that in view of the difficulty in proving a state of mind, which is an essential element here, that it is necessary for the Government's case.

* * * *

[4-44] MR. ROSEN: If Your Honor please, I would object.

THE COURT: I'm going to overrule the objection, but in part, ladies and gentlemen of the jury, the testimony that the witness attributes to Mr. Wilson with regard to use of the term "underworld characters," and subsequent testimony that may be elicited along similar lines, is normally hearsay testimony and cannot be admitted for the truth of the statement; in other words, that the statement made is a fact, that the people or the persons were underworld characters.

That's not the purpose for which the statement is being allowed to be offered by the witness as purportedly relayed to him by Mr. Wilson.

It may be considered by the jury only with regard to what affect, if any, this had or caused on this witness and Wilson's state of mind or fear under the allegations or charges that are contained in the indictment, and you may either accept or reject that testimony in whole or in part as you evaluate it, but [4-45] it is not coming in for the truth of the statement itself or the fact of which the statement purports to convey.

It is simply if it has any relevancy or value in the jury's mind as it may or may not relate to state of mind of Mr. Williams and/or Mr. Wilson.

* * * *

[8-165] There have been instances during the course of this trial where references were made to the defendants' alleged affiliations with organized crime. In each of the instances, the defendants Grassi and Santarelli were not present at the time the remarks were allegedly made. As such, these references were admitted into evidence for a very limited purpose, that is, to allow you to evaluate the state of mind of the witnesses.

You are not here to determine or even speculate on who, if anyone, is an alleged affiliate of organized crime. You are only to determine if the defendants are guilty or not of the charges set forth in the indictment. Their reputation is not before [8-166] you for an ultimate determination of facts.

From time to time during the course of the trial, this Court has given a limiting instruction under circumstances in which testimony by a witness is offered not for the truth of the statement but rather for the limited purpose of placing before the jury that the witness claims that such a hearsay statement was made. I caution you

that these statements may be considered by you only insofar as they tend to prove or disprove the state of mind, frame of mind or fear, if any, of the alleged victims; that is, the statement may be considered as evidence demonstrating the fear or lack thereof of the victims. The jury may accept such statements or reject the same in whole or in part for the limited purposes indicated. The actual truth of the contents of the statement may not be considered in your evaluation of the testimony.

* * * *

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-347

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GRASSI AND
DOMINIC SANTARELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of out-of-court declarations under Fed. R. Evid. 803(3) to show an extortion victim's fearful state of mind violates the Confrontation Clause.

2. Whether evidence of petitioners' underworld reputation, admitted solely to show their victims' fear, was unduly prejudicial and should have been excluded under Fed. R. Evid. 403.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Barber v. *Scully*, 731 F.2d 1073 ..... 6, 7
Boliek v. *Missouri*, No. 85-7087 (Oct. 14, 1986) 7
Bourjaily v. *United States*, No. 85-6725 (Oct. 14, 1986) .. 7
Dutton v. *Evans*, 400 U.S. 74 9
Lee v. *Illinois*, No. 84-6807 (June 3, 1986) 10
Mutual Life Ins. Co. v. *Hillmon*, 145 U.S. 285 9
Ohio v. *Roberts*, 448 U.S. 56 .....5, 6, 8, 9, 10
Sanson v. *United States*, 467 U.S. 1264 7
United States v. *Bernard S.*, 795 F.2d 749 9
United States v. *Inadi*, No. 84-1580 (Mar. 10, 1986) 5, 6, 9, 10
United States v. *Rodriguez*, 765 F.2d 1546 11

Constitution, statute and rules:

U.S. Const.:
Amend V (Self-incrimination Clause) 4
Amend VI (Confrontation Clause) 4, 5, 10
Hobbs Act, 18 U.S.C. 1951 1-2
Fed. R. Evid.:
Rule 403 ..... 11, 12
Rule 801(d)(2)(E) 6, 8
Rule 803(3) 6, 8, 9
Rule 804(b)(1) 8

Miscellaneous:

McCormick on Evidence (3d ed. 1984) 6, 8

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DANTE GRASSI AND
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 783 F.2d 1572.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 13, 1986. A petition for rehearing en banc was denied on June 4, 1986 (Pet. App. 16a-17a). On July 3, 1986, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including September 2, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of extortion, in violation of the Hobbs Act, 18

U.S.C. 1951. Petitioner Santarelli was sentenced to 14 years' imprisonment and fined $10,000. Petitioner Grassi was sentenced to 10 years' imprisonment.

1. The evidence at trial showed that in 1978, Robert Wilson and Richard Williams devised an illegal tax shelter venture using offshore Bahamian corporations. Wilson initially had difficulty finding start-up capital and therefore turned for assistance to petitioner Santarelli, who lived in Wilson's Ft. Lauderdale neighborhood. Santarelli gave Wilson a loan and introduced him and Williams to various influential Bahamians, who in turn helped them establish offshore corporations involved in the tax shelter. Pet. App. 1a-2a.

The tax shelter eventually began to raise a large amount of cash, and by January 1979, Wilson and Williams had repaid Santarelli's loan. Based on their financial success, Wilson and Williams started looking for other investments. In the course of their search, they spoke with one of Santarelli's Bahamian contacts about the possibility of establishing a lottery in the Bahamas. In March 1979, during a visit to the Bahamas, Santarelli learned about the proposed lottery from Charles Tritt, who was associated with Wilson and Williams in the tax shelter venture. Santarelli became upset that Wilson and Williams had not told him about the lottery, and he told Tritt that he was going to "call Florida and tell those two bastards to get over here for a meeting." Pet. App. 2a-3a.

A short time later, petitioner Grassi, who lived near Wilson in Ft. Lauderdale, summoned Wilson and Williams to his apartment. Grassi told them that Santarelli was upset that they did not inform him about the lottery proposal. Williams remarked that the money borrowed from Santarelli had been repaid with interest and that he felt no need to consult with anyone about his future activities. Grassi responded, "You got to show respect," and slapped Williams twice in the face with enough force to

raise welts and bruises. Wilson stepped between the two men, telling Williams to leave matters to him. Later that night, Williams told his girlfriend that he and Wilson had met with Mafia people. Wilson similarly told his wife about the meeting with Mafia people, and then broke down and cried in her presence. Pet. App. 3a, 8a.

Two days later, Wilson and Williams flew to the Bahamas and met with petitioners. Santarelli told them that they should have aproached him about the lottery in light of his help with their tax shelter scheme. He indicated that they "had made him look like a fool with his people in the Bahamas," and that he was "going to take a piece of the Bank"—a reference to the Federal Bank & Trust Company, Ltd., an offshore entity involved in the tax shelter. Williams then asked if Santarelli was taking five percent of the tax shelter scheme. Santarelli jabbed his finger into Williams's chest and said, "No, I'm taking one-third." When Williams started to argue, Wilson intervened and escorted him into the next room. Pet. App. 2a-4a.

When they were alone, Wilson told Williams to "let me handle this." Williams replied that they had done all the work and that "[i]t just [didn't] seem fair." Wilson rejoined: "Well, look, I don't know about you, but I got kids and I don't intend to argue * * *. You don't argue with people like this. If they say they want a third, they're going to take a third and what the hell are you going to do about it." Williams and Wilson thereupon returned to petitioners and told them that they could have a one-third interest in the tax shelter. Pet. App. 4a-5a.

Wilson and Williams subsequently informed Tritt that Santarelli was going to receive one-third of the tax shelter profits, and the three men discussed ways of adjusting the books to lower the profit figures, thereby reducing the share that Santarelli would receive. Wilson voiced opposition to Williams's plan, stating, "Just let it go. We'll pay the money." Pet. App. 5a.

Santarelli subsequently boasted to Tritt about how he had slapped Williams to straighten him out. He told another person that he had slapped Wilson "to get respect from him" and "to remind him who was in charge." Santarelli ultimately collected nearly two million dollars from Williams and Wilson. Pet. App. 5a.

2. Williams and Tritt both testified for the government at trial. Wilson, who was awaiting trial on criminal charges relating to the tax shelter, was not called as a witness. Wilson's out-of-court statements concerning his fear of petitioners were admitted into evidence, over objection, through the testimony of Williams and Tritt.[1]

After the government rested, Wilson appeared in court pursuant to a defense subpoena. The court then conducted a hearing outside the jury's presence to determine whether Wilson was available to testify. Because of his pending criminal case, Wilson invoked his Fifth Amendment privilege and refused to testify. At the government's request, Wilson was immunized, and petitioners were given a one-day recess to interview him. Although petitioners advised the court that Wilson had been "cooperative," they chose not to call him as a witness. Pet. App. 13a-14a.

3. The court of appeals affirmed (Pet. App. 1a-15a). It rejected petitioners' argument that the admission of Wilson's out-of-court statements relating to the extortion victims' fear violated the Confrontation Clause. The court observed (Pet. App. 13a) that petitioners had the opportunity to cross-examine Williams about whether Wilson had made the statements. It also noted (*id.* at 13a-14a) that since Wilson had been produced and immunized, petitioners could have "examine[d] him to their heart's content if they had chosen to do so." The court further held (*id.* at 11a-12a, 15a) that the district court did not abuse its dis-

[1] The trial court instructed the jury that Wilson's statements were admitted solely to show his state of mind (Pet. App. 12a, 21a-23a).

cretion in admitting testimony about Wilson's belief that petitioners were linked to organized crime. That evidence, the court noted (*id.* at 11a-12a), was not offered for its truth, but only to show the victims' state of mind.

ARGUMENT

1. Relying on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), petitioners contend (Pet. 7-19) that their rights under the Confrontation Clause were violated by the admission of Williams's testimony about Wilson's out-of-court statements. While they concede (Pet. 8 n.4) that the statements were properly admitted for the non-hearsay purpose of showing Williams's own state of mind,[2] they argue (Pet. 6-19) that their rights were violated to the extent that those same statements were also used to show Wilson's state of mind. Before admitting the statements for that purpose, petitioners claim, the district court was required to find that the statements were reliable and that Wilson was unavailable. That claim is without merit.

a. In *Roberts,* this Court held that, in order to satisfy the Confrontation Clause, preliminary hearing testimony may not be admitted as a substitute for live testimony absent a showing that the evidence is reliable and that the declarant is unavailable. On the issue of reliability, the Court stated (448 U.S. at 66) that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." It further indicated (*ibid.*) that even where hearsay does not fall within such an exception, it may still be admitted without violating the Confrontation Clause if it is supported by a "showing of particularized guarantees of trustworthiness."

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[2] See *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 11 n.11 (noting that admission of non-hearsay does not raise Confrontation Clause concerns).

The Court in *Roberts* also held that before preliminary hearing testimony could be used, the government had to show that the declarant was unavailable. The Court stated, however, that "[a] demonstration of unavailability * * * is not always required" (448 U.S. at 65 n.7). Subsequently, in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), the Court refused to apply the *Roberts* unavailability rule to co-conspirators' out-of-court statements admitted pursuant to Fed. R. Evid. 801(d)(2)(E). The Court stated (slip op. 4, 6) that *Roberts* was not a "wholesale revision of the law of evidence," but that it "simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony." Thus, according to the Court, *Roberts* "cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable" (*id.* at 6). In contrasting the statements before it with those in *Roberts*, the *Inadi* Court pointed out (*id.* at 7) that, unlike co-conspirator declarations made while the conspiracy is in full force, "former testimony often is only a weaker substitute for live testimony" and "seldom has independent evidentiary signficance of its own."

b. In the present case, the reliability requirement was clearly met. Since the declarations at issue fall within a "firmly rooted hearsay exception"—the state of mind exception codified in Fed. R. Evid. 803(3)—reliability can be inferred without more. *Roberts*, 448 U.S. at 66; *Barber* v. *Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984) (applying *Roberts* and concluding that state-of-mind testimony is a firmly rooted exception to the hearsay rule); see generally *McCormick on Evidence* § 294, at 844 (3d ed. 1984) (footnote omitted) ("The special assurance of reliability for statements of present state of mind rests * * * upon their spontaneity and probable sincerity."). Even if an inference of reliability is not permitted by the very nature of the

evidence, it is nonetheless clear that the statements at issue in this case were reliable. As petitioners acknowledge (Pet. 24-25 n.22), an extortion victim's fearful state of mind "can be inferred from the words and acts of the defendant, and in many cases, the very fact that the victim transferred property to the defendant will be strong circumstantial evidence of his fear." In the present case, petitioners' words and actions caused Wilson and Williams to transfer close to two million dollars to Santarelli shortly after Santarelli said he was "taking" one-third of the tax shelter. Under those circumstances, there is little room for doubt that Wilson's fear of petitioners was genuine.

Petitioners contend (Pet. 14-16) that the court of appeals adopted "a conclusive presumption of reliability based on the applicability of a hearsay exception," and that this *per se* approach conflicts with the rule followed in various other circuits. The conflict cited by petitioners is not relevant here; that conflict involves the issue of whether *co-conspirator statements* fall within the category of a "firmly rooted hearsay exception," thereby giving rise to an inference of reliability under *Roberts* (see Pet. 16 & n.13); see generally *Sanson* v. *United States*, 467 U.S. 1264, 1265 (1984) (White, J., dissenting from denial of certiorari) ("The Circuits are divided on the question whether co-conspirator statements fall within the 'firmly rooted hearsay exception' language of *Roberts* or whether, instead, a case-by-case inquiry into reliability is required."). The Court has recently granted review to resolve that conflict. See *Bourjaily* v. *United States*, cert. granted, No. 85-6725 (Oct. 14, 1986). It is unnecessary to hold this case pending the decision in *Bourjaily*, however, because that case does not in any way involve the state-of-mind exception to the hearsay rule. Statements under the state-of mind exception clearly fall within a firmly rooted exception (*Barber*, 731 F.2d at 1075; cf. *Boliek* v. *Missouri*, No. 85-7087 (Oct. 14, 1986) (Marshall, J., dissenting from

denial of certiorari) (asserting that inference of reliability is not appropriate where evidence admitted not to prove state of mind but to show truth of victim's belief that defendant intended to kill her)). Petitioners have cited no case holding that an inference of reliability is improper as to statements offered to establish the declarant's state of mind. Because there is no conflict among the circuits as to the requirement of a separate reliability finding with respect to such statements, further review of that issue is unwarranted.

c. On the issue of unavailability, we submit that statements admitted under the state-of-mind exception to that hearsay rule, like the co-conspirator statements in *Inadi*, are not subject to an unavailability requirement. On this issue, the Federal Rules of Evidence are instructive.[3] Rule 804(b)(1), Fed. R. Evid., the counterpart to the hearsay exception involved in *Roberts*, expressly requires that the declarant be shown to be unavailable. By contrast, there is no unavailability requirement with respect to co-conspirator statements (Fed. R. Evid. 801(d)(2)(E)) or statements admitted to show state of mind (Fed. R. Evid. 803(3)). The reason that the rules do not impose an unavailability requirement with respect to certain categories of hearsay—such as statements admitted under Rule 803(3)—is that "the [declarant's] out-of-court statement is at least as reliable as would be his testimony in person, so that producing him would involve pointless delay and inconvenience." *McCormick on Evidence, supra,* § 253, at 753. A constitutional unavailability requirement for statements offered under Rule 803(3) would impose a substantial additional burden on the prosecution to identify, locate, and produce the declarants, even though the

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[3] While the hearsay rules are, of course, not dispositive on the constitutional issue, they are nonetheless relevant, since the hearsay rule and the Confrontation Clause are designed to protect similar concerns. See, *e.g.*, *Roberts*, 448 U.S. at 66.

out-of-court statements are as reliable as declarants' live testimony. The Court in *Inadi* (slip op. 11) refused to impose those significant burdens on the government in the context of co-conspirator statements, because it recognized that the benefits of such a requirement would be marginal (*id.* at 11-12). Petitioners fail to explain why, in light of *Inadi*, there is any greater reason to impose an unavailability requirement in the context of statements admitted under Rule 803(3).

Even where an unavailability requirement normally applies, it is well established that the Confrontation Clause does not require that unavailability be shown where the testimony is neither crucial to the prosecution nor devastating to the defense. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 65 n.7; *Dutton* v. *Evans*, 400 U.S. 74, 87 (1970); *United States* v. *Bernard S.*, 795 F.2d 749, 754 (9th Cir. 1986). In the present case, it is undisputed (Pet. 8 n.4) that the testimony at issue was properly admitted for the non-hearsay purpose of showing Williams's fear. Under such circumstances, the additional use of the very same testimony to show Wilson's fear—a showing that was not necessary for the government to meet its burden of proof—clearly was not crucial to the government. Nor was the absence of Wilson's in-court testimony devastating to the defense. See generally *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 295 (1892) (noting that if declarant were to testify, "his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said"). Indeed, petitioners' assumption that they would have benefited from Wilson's testimony is undermined by the fact that their attorneys interviewed him and chose not to call him as a witness at trial.

In any event, even if statements offered to show state of mind could be admitted only if the declarant was produced or shown to be unavailable, that requirement was met

here. Wilson was initially "unavailable" as a prosecution witness because he had a valid Fifth Amendment privilege based on his pending criminal trial relating to the tax shelter. See *Inadi*, slip op. 9. Later in the proceedings, the trial court granted Wilson immunity at the government's request, and Wilson agreed to be interviewed by defense counsel. As the court of appeals observed (Pet. App. 14a), petitioners thus had the chance "to examine Wilson [on the stand] to their heart's content if they had chosen to do so." Nothing more is required by the Confrontation Clause.[4]

2. Petitioners also contend (Pet. 20-25) that Wilson's statements about their reputed underworld connections should have been excluded by the district court under Fed.

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[4] Petitioners argue (Pet. 10-14) that the ability of the defense to call a declarant to the stand, even as a hostile witness, is not equivalent to being able to cross-examine him. And they cite to a conflict in the circuits (Pet. 10-11) on whether the government must actually call a witness to the stand or simply make him available to the defense in order to satisfy the burden of producing the witness at trial. The cases cited by petitioners (Pet. 11 & n.7) in support of their position, however, all predate *Roberts* and *Inadi*. In *Roberts*, the Court rejected the argument that cross-examination is invariably required. In that case, the preliminary hearing testimony introduced at trial by the government was of a witness called at the preliminary hearing *by the defense*. The fact that the prior confrontation was not strictly by way of cross-examination did not render the later use of the testimony improper under the Confrontation Clause (see 448 U.S. at 70-71). Similarly, in *Inadi* the Court strongly suggested (slip op. 9-10 & n.10, 12) that making an out-of-court declarant available to the defense would satisfy the Confrontation Clause even where the Clause would otherwise require the government to show that the declarant was unavailable. See also *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 3 n.3 (Blackmun, J., dissenting) (although majority did not consider issue of unavailability, dissenting justices indicated, citing *Roberts*, that the Confrontation Clause is satisfied where the declarant is present and can be called by either the defense or the prosecution). In any event, since the unavailability requirement does not apply at all in the present case, the conflict cited by petitioners—even if still a live one—is not presented on this record.

R. Evid. 403 on the ground that those references were unduly prejudicial. Petitioners do not dispute that the evidence was relevant to establish the extortion victims' fear (Pet. 24-25),[5] and also that the district court has broad discretion in determining whether to exclude relevant evidence under Rule 403 (see, *e.g.*, *United States* v. *Rodriguez*, 765 F.2d 1546, 1562 (11th Cir. 1985)).[6] They argue (Pet. 24), however, that the admission of the reputation evidence was unfair in this particular case because there was no evidence that petitioners "affirmatively advised or relied upon the reputation" attributed to them.

As the court of appeals reasoned (Pet. App. 8a, 11a-12a), the evidence at trial clearly established that petitioners threatened their victims and sought to instill fear in them. Moreover, petitioners acted in a manner entirely consistent with Wilson's belief that they had underworld connections: they ordered Wilson and Williams to meet with them in South Florida and the Bahamas; they demanded an exorbitant share of the tax shelter proceeds in return for the start-up loan that had been fully repaid; they ordered Wilson and Williams to "show respect"; and they used physical force to obtain both "respect" and money (*id.* at 2a-9a). In short, the evidence in question was highly relevant to show the reason for the victims' fear and to explain why the victims acquiesced in petitioners' demands. Moreover, Wilson's statements were less prejudicial than extrinsic evidence of petitioners' organized

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[5] As noted above, the district court cautioned the jury that the reputation evidence was not admitted to show that petitioners in fact had underworld connections but only to establish the victims' fear (see Pet. App. 12a, 21a-23a).

[6] As the court of appeals correctly observed (Pet. App. 14a), Rule 403 is "an extraordinary remedy" that "should be used sparingly because it permits the trial court to exclude otherwise relevant evidence."

crime connections would have been; it was open to them to argue that Wilson's concerns were unfounded, and that they had not been aware of or tried to exploit his fears of them. Without the evidence of Wilson's statements, however, the jury would not have had a complete picture of the pressures under which Wilson and Williams were acting when they acquiesced in petitioners' demands. Under these circumstances, the probative value of the evidence clearly outweighed its prejudicial impact. The district court therefore did not abuse its discretion in refusing to exclude that evidence under Fed. R. Evid. 403.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GRASSI & DOMINIC SANTARELLI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases: **Page**

Barber v. Sculley, 731 F.2d 1073 (2d Cir. 1984) 3
Bourjaily v. United States, 781 F.2d 539 (6th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986) (No. 85-6725) 1, 2, 4, 5, 7
Lee v. Illinois, 106 S. Ct. 2056 (1986) 4, 5
Ohio v. Roberts, 448 U.S. 56 (1980) 2, 3, 5
Stevens v. Bordenkircher, 746 F.2d 342 (6th Cir. 1984) 4
United States v. Ammar, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983) 3
United States v. Massa, 740 F.2d 629 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985) 3
United States v. Inadi, 106 S. Ct. 1121 (1986) 3, 5, 6
United States v. Johnson, 735 F.2d 1200 (9th Cir. 1984) 3
United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) 4
United States v. Young, 736 F.2d 565 (10th Cir. 1983), *rev'd on other grounds*, 470 U.S. 1 (1985) 3
United States v. McKinney, 707 F.2d 381 (9th Cir. 1983) 4
United States v. Vretta, 790 F.2d 651 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986) 4
Williams v. Melton, 733 F.2d 1492 (11th Cir.), *cert. denied*, 105 S. Ct. 567 (1984) 3

Statutes:

Fed. R. Evid. 801(d)(2)(E) 2, 4
Fed. R. Evid. 803 3
Fed. R. Evid. 804 3
Fed. R. Evid. 804(b)(5) 4

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REPLY BRIEF FOR PETITIONERS

The United States, in its brief in opposition, does not contest the importance of the issues raised here by petitioners or deny that the circuits are in conflict on those issues. Indeed, with respect to one of these issues, it was barred from making any such argument by the fact that the Court has recently granted review in a case involving that very issue. *See Bourjaily v. United States*, 781 F.2d 539 (6th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986) (No. 85-6725). Instead, the focus of respondent's brief is an effort to show that the present case does not actually raise the issues

we have put forward for review. Because this effort is unavailing, the Court should grant review or, at minimum, hold the case pending the outcome in *Bourjaily*.

1. The first issue addressed by the United States is whether admissibility of a hearsay statement under a "firmly rooted" hearsay exception is *automatically* sufficient to eliminate Confrontation Clause concerns—*i.e.*, without any judicial examination of the reliability of the particular statement at issue. As we noted in our petition, this Court in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), stated that "[r]eliability *can* be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." (Emphasis added.) As we further noted, the circuits are split on whether this inference of reliability should be made in all cases or only where the particular circumstances are consistent with a finding of reliability. Pet. 14-16.

Respondent, however, suggests that this is not an open question with respect to statements admitted under any hearsay exception other than the co-conspirator hearsay rule in Fed. R. Evid. 801(d)(2)(E). In its view, the unresolved issue raised in *Bourjaily*, *supra*, is not the mandatory or permissive nature of the *Ohio v. Roberts* inference of reliability, but simply whether co-conspirator statements are among the "firmly rooted" hearsay exceptions covered by that inference. Because the present case involves not co-conspirator statements but another form of hearsay, respondent argues that *Bourjaily* and the underlying conflict among the circuits have no relevance to this case.

The flaw in this argument is that it mischaracterizes the decisions of the lower courts in this area, as well as the issues likely to be discussed and decided in *Bourjaily*.[1] While there have been a few lower-court cases

[1] The relevant question presented in *Bourjaily* is "Whether, as a requirement for the admission of a co-conspirator's statement

that do focus on whether the co-conspirator rule is "firmly rooted," [2] the more fundamental issue—*i.e.*, the proper application of *Ohio v. Roberts* to *any* kind of admissible hearsay—is also an open question. Co-conspirator cases are certainly the most common type in this area.[3] But even in cases involving *other* types of hearsay admissible under other exceptions, the circuits are split on the relationship between admissibility and reliability under the Confrontation Clause. Some courts have agreed with the decision below and equated reliability with admissibility under the rules of evidence, *see, e.g., Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984), while others have seen a need to undertake an independent review of reliability in order to satisfy the Sixth Amendment, *see United States v. Young*, 736 F.2d 565, 569 (10th Cir. 1983), *rev'd on other grounds*, 470 U.S. 1 (1985); *United States v. Johnson*, 735 F.2d 1200, 1203 (9th Cir. 1984); *Williams v. Melton*, 733 F.2d 1492, 1495-96 (11th Cir.), *cert. denied*, 105 S. Ct. 567 (1984);

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against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability." 55 U.S.L.W. at 3257 (October 14, 1986). This question is broad enough to encompass both the issue presented in our petition and the alternate version suggested by respondent.

[2] *See United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); *United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983). These cases take note of the fact that co-conspirator statements are technically admitted as "non-hearsay" under Fed. R. Evid. 801, rather than as a hearsay exception under Fed. R. Evid. 803 or 804. This Court, however, has recently noted that this distinction has no real meaning in the Confrontation Clause context. *United States v. Inadi*, 106 S. Ct. 1121, 1128 n.12 (1986).

[3] The preponderance of co-conspirator cases, we submit, is largely a result of the fact that this particular type of hearsay is the most commonly used, in criminal prosecutions. *See United States v. Inadi*, 106 S. Ct. 1121, 1128 (1986).

United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).[4]

Respondent's effort to limit the *Bourjaily* case to co-conspirator hearsay is especially difficult to understand in light of the position adopted just last Term by the four dissenting justices in *Lee v. Illinois*, 106 S. Ct. 2056 (1986)—a position which we discussed in some detail in our petition but which the United States does not even acknowledge. *Lee* did not involve the type of co-conspirator's statement admissible under Fed. R. Evid. 801(d)(2)(E), since the statement at issue, a co-defendant's confession, could not be characterized as made "during the course and in furtherance of" a conspiracy. Instead, the state sought to justify the admission of this statement under the hearsay exception for "declarations against penal interest." Justice Blackmun, dissenting for himself and three other Justices, argued that the admission of this statement did not violate the Confrontation Clause. In so doing, he began with the proposition that the "hearsay exception for declarations against interest is firmly established."[5] 106 S. Ct. at 2068. But, far from arguing that this ended the Sixth Amendment issue, he noted that "the requirements of the Confrontation Clause and the hearsay rule often diverge," *ibid.*, and proceeded to analyze the particular factual circumstances for several pages before conclud-

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[4] *See also United States v. McKinney*, 707 F.2d 381, 383-84 (9th Cir. 1983) (*dictum*) (independent determination required); *Stevens v. Bordenkircher*, 746 F.2d 342, 348 (6th Cir. 1984) (*dictum*) (same); *United States v. Vretta*, 790 F.2d 651, 660 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986) (independently assessing the reliability of a statement admitted under the "catch-all" hearsay exception of Fed. R. Evid. 804(b)(5)).

[5] Because the majority disagreed with this proposition, 106 S. Ct. at 2064 n.5, it did not reach the issue of the significance of admissibility under the hearsay rules for purpose of the Confrontation Clause.

ing that the statements were sufficiently reliable to pass constitutional muster.

In light of the *Lee* dissent, and the other cases cited above, it is simply indefensible for the United States to suggest that there is no doubt about the relationship between admissibility and reliability for statements admitted under exceptions other than the co-conspirator exception. In *Bourjaily*, the Court will in all likelihood be deciding that very issue—*i.e.*, when, if ever, admissibility under any hearsay exception is a proxy for separate constitutional scrutiny. For that reason, the Court should at minimum hold this case pending the outcome in *Bourjaily*.

2. The other Sixth Amendment issue raised in our petition involved the Eleventh Circuit's alternative holding that all Confrontation Clause concerns are eliminated if the prosecution makes the out-of-court declarant available to the defense to be called as a defense witness. This, the court held, is the functional equivalent of providing the defense an opportunity to cross-examine the declarant at the time the statement is first introduced. As a result, under the holding below, there was no need for further analysis, under *Ohio v. Roberts*, of the *reliability* of the hearsay statements or the *unavailability* of the declarant as a prosecution witness. Here again, as we demonstrated, the court's holding conflicts with that of several other circuits. Pet. 11.

The Government's response on this issue is wholly insufficient. It relies primarily on two cases—*Ohio v. Roberts* and *United States v. Inadi*—neither of which can possibly be said to resolve the issue at hand. Opp. 10 n.4. At no time, other than in a footnote in the *Lee* dissent discussed in our petition, at page 10, has this Court suggested that an opportunity to call a witness is a sufficient substitute for cross-examination so that all

Sixth Amendment challenges to hearsay evidence are ended.[6]

3. Finally, we note that the United States has failed to answer the heart of our claims with respect to the admission of testimony linking petitioners to organized crime. The problem we raise is the danger that an alleged victim in a Hobbs Act case will have received information about the defendant from some third party, and interpreted the defendant's innocent conduct as extortionate because of this extrinsic information. The solution, we submit, is to require a prior showing that the defendant was aware of, and thus could have exploited, the information about his reputation that was made known to his alleged victim.

Faced with this problem, it is not enough for the respondent to argue that the defendants' conduct was "consistent with" the information received from third parties linking them with organized crime. Opp. 11. Their conduct was also, presumably, "consistent with" many other possible descriptions of their character that the alleged victims *might* have received. What the Government should be required to show, before introducing third-party statements characterizing the defendants as members of organized crime, is that the defendants were aware that they were so perceived by the alleged victims, and thus could have made improper use of this perception. No such showing was made here.

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[6] In *Inadi*, the Court and the dissenters indicated that the defendant remained free to challenge the reliability of the out-of-court statements. *See* Pet. 12 n.9.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the case should be held pending the outcome in *Bourjaily*.

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